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THE WHITE HOUSE

WASHINGTON

December 11, 1981

12/22/81
called
C. Bliss

MEMORANDUM FOR ELIZABETH DOLE

VIA: JACK BURGESS *JB*
FROM: WAYNE VALIS *Wayne*
SUBJECT: FOREIGN CORRUPT PRACTICES ACT

Yesterday, Christine Bliss, Legislative Assistant to Senator Chafee, met with me to discuss the Foreign Corrupt Practices Act. She prepared the enclosed document which describes the status of this legislation. Briefly, the bill was submitted by Senator Chafee and supported almost unanimously by business. It passed the Senate by a voice vote this past week. However, the legislation is stymied in the House because Tim Wirth is refusing to hold hearings and has it bottled up in his Committee on Telecommunications Policy.

Senator Chafee asked Miss Bliss to approach me on setting up a coalition group to work on FCPA in the House. I informed her that I would be happy to be of assistance, but that I would not be able to do anything concrete until I cleared it with you and the White House Legislative Affairs Office.

Elizabeth, I would appreciate it, if you concur, if I could notify Friedersdorf/Duberstein on this. I promised that I would call Miss Bliss within the next week.

Do you wish us to go forward now?
Thanks...

attachment

STATUS OF S. 708, BUSINESS PRACTICES

AND RECORDS SIMPLIFICATION ACT

I. BACKGROUND

The Foreign Corrupt Practices Act was passed unanimously by both Houses in December of 1977. It was enacted as a result of an investigation by the Securities and Exchange Commission which revealed questionable and in some cases illegal foreign payments by over 450 U.S. companies to foreign officials to secure export business. The disclosures, in at least two notable instances in Japan and The Netherlands, contributed to the downfall of the governments in those countries due to the involvement of government officials in illegal payments by U.S. companies.

The Act contains two parts: accounting requirements and antibribery provisions. The accounting section requires issuers to keep accurate books and records and to establish internal accounting control systems to prevent the establishment of off-the-books slush funds. The accounting provisions are part of the Securities Act of 1934, are enforced by the SEC and impose civil and criminal penalties. The anti-bribery provisions prohibit U.S. companies from making payments to foreign officials for the purpose of securing business. Because many of the illegal payments disclosed were made by foreign sales representatives of U.S. companies, the Act includes a provision which holds a company or its officers liable if they know or have reason to know that the representative has paid a bribe. The antibribery provisions impose civil and criminal penalties and are enforced by the Justice Department except for the prosecution of a civil action against an issuer.

II. NEED FOR AMENDMENT OF THE FCPA

The implementation of the Act has created a number of problems. The Act contains a number of ambiguities and poses considerable and unnecessary burdens on U.S. companies who are required to comply with the law. For example, the accounting provisions contain no clear demarcation of liability and instead impose a vague "reasonableness" standard. Additionally, there is no guidance as to the extent of a parent corporation's liability for the acts of its foreign subsidiary. The antibribery provisions also contain ambiguities. The "reason to know" standard which governs the liability of companies or their officers for the acts of agents is unclear and far harsher than the standard under domestic bribery law. Although Congress intended to exclude "grease payments" from the Act, this exemption is not made explicit in the Act.

The ambiguities in the Act in addition to the unwillingness of the Justice Department to issue meaningful compliance guidelines, have had a chilling effect on U.S. exports. One group, the Emergency Committee for American Trade, which represents over 650 major U.S. corporations surveyed its members as to the effect of the Act and found that its members said that the ambiguities in the Act were a major contributing factor in the loss of \$20 billion in export business in the last year.

III. PROVISIONS OF S. 708

Senator Chafee introduced S. 708 on March 12, 1981, in an effort to eliminate the ambiguities in the current Act. A companion bill, H.R. 2530, was introduced in the House by Congressman Rinaldo on the same day. The bill was referred to the Senate Banking Committee. The Securities Subcommittee and the International Finance and Monetary Policy Subcommittee held five days of joint hearings on the bill. The bill was reported out of Committee by a bipartisan vote of 11 to 4. The bill has been referred to the Telecommunications Subcommittee of the House Energy and Commerce Committee.

As passed by the Senate, S. 708 would amend the accounting provisions of the current law by:

- 1) eliminating the requirement of keeping books and records;
- 2) making individuals liable only for knowing violations and issuers liable unless they make a good faith effort to comply; AND
- 3) imposing liability on parent corporations for the acts of their foreign subsidiaries only if they fail to make a good faith effort to encourage the subsidiaries' compliance.

The most important amendments to the antibribery provisions contained in the bill are:

- 1) replacement of the reason to know standard with a directs or authorizes expressly or by a course of conduct standard;
- 2) consolidation of enforcement of the bribery provisions in the Department of Justice; AND
- 3) a clear statement of what types of payments are exempt from the Act.

IV. POOR PROSPECT FOR HOUSE ACTION ON S. 708

Congressman Wirth, who Chairs the Telecommunications Subcommittee which has jurisdiction over the bill, has repeatedly refused to schedule hearings on the bill. He has been holding oversight hearings on the Act itself. Congressman Wirth has stated that he does not believe that there is any need to amend the Act because he has not seen any evidence that the Act has had a chilling effect on U.S. exports. Such evidence has been presented during the two days of oversight hearings that have been held and is readily available to his staff. Thus, it would appear that this argument may be merely an excuse for inaction.

Additionally, there are those who believe that the bill is viewed as a partisan issue. Finally, it has been rumored that the former SEC attorneys on the Committee staff are advising Committee members that changes in the FCPA are unwarranted.

The House bill currently has only 12 cosponsors including three Democrats, Luken, Alexander and LaFalce. Congressman Rinaldo probably will reintroduce the Senate-passed version of the bill next Monday.

The business groups that have been working on the bill are lobbying the Telecommunications Subcommittee members as well as Congressman Dingell. Senator Chafee is also calling Subcommittee members and has talked with Dingell. However, without additional assistance from the Administration in rallying support on the Subcommittee, it is very likely the bill will die in the House.

V. REQUIRED ACTION

What is needed is a coordinated effort to get hearings and a mark-up scheduled on the House bill.